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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 742.

JAMES J. WALSH, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

against

FREDERICK F. BREWSTER.

BRIEF AS AMICUS CURIAE FOR C. J. HEPPE & SON.

H. EDGAR BARNES,
Counsel for C. J. Heppe & Son.

(NOTE.—The following discussion was published in essay form, and by reason of its analysis of the questions now before this court in the entitled case, it was suggested to its author that it be filed with the court as a brief *amicus curiæ*.)

Is Capital Income?

Does the Power of Taxation to Destroy Extend to the Destruction of Constitutional Guarantees?

By

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OF THE

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Preface

"In this consists freedom, viz., in our being able to act "or not to act as we shall choose or will."

—Locke, H. U. II, XXIX, 27.

Full inquiry, it is believed, will prove that, had it not been for the constant and faithful vigil that the Supreme Court has maintained, in the performance of its highest function—the preservation of our Liberty —the United States during the past decade would have become, at least economically, as communistic as Russia itself, with all the accompanying evils involved.

Nothing could be more unfortunate than the growing tendency of the Government during that period to meet every difficulty, no matter how temporary or self-remedying, by legislation, which, if sustained, would nullify permanently the most vital of those Constitutional rights, of which the Supreme Court continues the ever faithful and sworn defender.

It would serve no purpose to discuss at this point the multiplicity of instances proving this assertion. It is sufficient for the present to point out that on a single recent day, Articles IV, V and VI of the Constitutional Amendments would have been in great part nullified, but for the Court's faithful and patriotic performance of its duty. And this blow at our freedom would have met the approval of ignorant critics who happily have not failed to have their absurdities exposed. A leading and most able journal recently said: "What is unfortunate is that ignorant, "thoughtless, reckless lawmakers rode at a hard gallop "through the Constitution of the United States, so in-"capable of doing what needed to be done, so heedless

"of whither they were headed, that a unanimous Su-
"preme Court, Conservatives, Liberals, and Radicals
"all together, condemn their performance as illegal
"and insufferable. * * * The invalid sections of the
"Lever Act, in short, made a hash among other things
"of the guarantees of the Constitution of the United
"States * * *. **Judge and Jury could become Constitu-
"tion, Statute Law, judicial process, economic ruler, ar-
"biter of destiny—everything. The only unfortunate thing
"about the Supreme Court's decision, in truth, is that it
"had to be because the crazy Lever Act was."**

There could be no more absurd error than concluding from the fact the jackasses bray so loudly that they represent the enduring convictions of the American people, as to the paramount necessity of preserving their Liberty. Communism seems all embracing, until it is put to the test of an election, or trial before a jury upon an indictment—when it becomes less than the shadow of a shade.

And the "Lever Act was" simply the result of a disregard of the instruction perfectly available and to be found in the history of the economic, the common, and our constitutional law. In a recent Essay, "Does Price-Fixing Destroy Liberty?", the writer discussed the subject of governmental interferences with the Liberty of Trade as affected by the Lever Act. The present inquiry considers the dangers to our Freedom involved in the attempts being made, not by Constitutional Amendment, but by claims of amplifying construction to **nullify** further the provisions of **Article I, Section 2, Clause 3; and Article I, Section 9, Clause 4, of the Constitution as originally drafted**, relating to direct taxation.

The attempt has been made in the Essay above

mentioned—"Does Price-Fixing Destroy Liberty?"—to show how vital a preservation of Liberty is to the happiness of America, a summary of the subject is therefore only necessary.

Locke's definition, as quoted above, is, of course, generally correct, but, as it is essential to Justice that all men should be safeguarded in an **equal** enjoyment of this most vital thing, his definition, for Constitutional purposes, must be so far restricted as the common welfare requires in this respect. But, as the Common Law always points out, the primary presumption is **always in favor of the greatest Liberty possible, which is simply saying the same thing in another form, for if Liberty be confined to but a few, it is necessarily greatly restricted**; and the burden of proof is always upon those contending for restriction, and restriction of Liberty is always **prima facie** bad. We must, too, never forget that as Thomas Jefferson and other great statesmen have truthfully stated: "**The natural order of things is "for Liberty to yield and for Government to gain ground.**" And all History but testifies that this **has been** the chief danger, the most ominous threat, not merely to Governments, but to civilization itself.

Restrictions, therefore, introduced into the Constitution to safeguard against this tendency, are deserving of the highest respect and most vigilant care. It will be found that great attention has been heretofore given by Jurists to the "**genesis**" of the Sixteenth Amendment, which, no doubt, is important; but what to the writer seems even more important, is that so far as he has ascertained, **no proper inquiry has yet been made**, as to the "**genesis**" of the two clauses in the Constitution in part amended by it. The purpose of this article is, therefore, to inquire, using the methods

prescribed by the Supreme Court, as to the exact meaning of the original Constitution, the purpose for which it was introduced, and the dangers to Liberty which it was intended to remove. As Mr. Justice Holmes has clearly in such matters pointed out, economics and statesmanship are proper aids in reaching proper solution, a word upon these subjects may not be without value. It is universally acknowledged that all restraints upon trade ("which the law so abhors") are prima facie bad. Such restraints have been demonstrated for centuries to curtail trade. Freedom is the prime requisite for enlarged production, while servitude its surest restraint. It most certainly follows that provisions which inhibit men from transfering capital from one capital use to another, as the exigencies of business may require, leaving, of course, the enlargement of income that thus becomes available for Governmental purposes, must strongly tend not only to impoverishment of the community, but to the depletion of Governmental resources. No man of large business activity can honestly fail to testify to innumerable cases where both the National wealth and the Government's revenue have suffered from this very cause. A merely superficial inquiry would disclose endless beneficial transactions, that have been precluded by the fear that these necessary and productive shifts of Capital, (because of the pretense that they in some mysterious way changed in to "Income"), might thus result in its confiscation. Admittedly Capital is one of the prime necessities of employment and production, without which neither the people or the Government can thrive. Necessarily business is restrained from following its natural and productive bent, by, in effect, penalizing it for continuing its free course as determined by business requirements. This is greatly accentuated by

the condition of our currency. A single illustration may suffice—and there are multitudes of such cases. Assume that a man has invested his capital in a certain business or productive property: The Government, then, so inflates its currency that he must get, and can get, two dollars (now worth really fifty cents apiece), in the place of the one hundred cent dollar which before really measured the value of his property. A change of investment becomes desirable from all points of view; but he cannot make it, if, perhaps, half of his capital investment can be wrested from him, so that he can only replace his present capital investment with one of half the productive and real value. Such a Government policy, as is pointed out in the Boyd Case, 116 U. S. 616, is the exact equivalent of positive prohibition. This indeed, would certainly create a new and most vicious "law of diminishing returns." That the mere threat has, and is doing an enormous amount toward creating the present distressing state of employment and business, will be testified to by any intelligent man largely familiar with business; that it will, hereafter, tend even more largely to deplete, instead of increase, the revenues of the Government, as return from inflation to deflation, must be plain to any man making any pretensions to statesmanship; that it is a dangerous invasion of the Liberty and independence of America, that the Constitution was chiefly intended to preserve, will, it is hoped, be made clear in what is now to follow.

Is Capital Income?

Does the Power of Taxation to Destroy Extend to the Destruction of Constitutional Guarantees?

CHAPTER I.

The Meaning and Genesis of the Clauses in the Constitution Relating to Direct Taxation.

"At times Judges need for their work the training of "economists and statesmen, and must act in view "of their foresight of consequences."

—Mr. Justice Holmes, Northern Securities case, 193 U. S., page 401.

Is Capital Income? A foolish question? A vital one, for if the Fathers be right, upon its correct solution, may depend both the continuance of our essential liberties and of free government.

To ascertain the truth of this, one has but to understand and follow the guidance to be procured from a correct comprehension of the inspired quotation made above, as it, if understood, points to the fundamental distinction between our Supreme Court and those of all other countries. The duty of other Courts is not to make, but to declare the law already established. As to them, it might properly be asked: What theories of economics or statesmanship have to do with the performance of their function?

But the Supreme Court is not an **ordinary** Court. On the contrary, as the greatest creation of the Fathers, it has a far higher and nobler purpose,—that is, **the preservation of American Liberty**; the Justices constitute **the sworn guardians of the last defense of Free-**

dom; and as their high function, necessarily, requires knowledge of economics and statesmanship, these become the very vitals of proper solution, **where Liberty is in question.** And Liberty is always in question, where a taking of property **without consent** is involved. Indeed, all the Anglo-America Civil Wars have turned chiefly upon this paramount matter; for it must not be forgotten that the same principle which underlies these taxes is involved in the decisions relating to restraints of trade and monopolies. Monopolies have always been denounced as "odious" and "pernicious," because they create a power of taxation **without consent**, whether it be for the benefit of such governments as the Tudors and Stuarts attempted to erect,—or, what is even worse, that of private individuals seeking to this extent to enslave their fellows. The seed thus sown by Mr. Justice Holmes, therefore, inevitably grew into the great inquiry made by the united Court in the Standard Oil case, 221 U. S. 1, a decision that, at last, has brought satisfactory solution of the general principle, without a knowledge of which the necessary degree of clarity and certainty continued lacking.

To very much the same effect is Mr. Justice White's opinion in the Knowlton case, 178 U. S., at page 57—one of the decisions, also that helps to a correct understanding and proper definition to be gained from the discussions of those taking part in the formation of the original Constitution. He said: "The "necessities which gave birth to the Constitution, the "controversies which preceded its formation, and the "conflicts of opinion which were settled by its adop- "tion, may properly be taken into view for the pur- "pose of tracing to its source any particular provision "of the Constitution, in order thereby to be enabled to "correctly interpret its meaning."

To the many similar authorities may be added a single quotation from Mr. Justice Pitney's decision in the Eisner case, 252 U. S. 189: "A proper regard for "its genesis, as well as its very clear language, requires "also that this amendment" (the XVI) "shall not be "extended by loose construction, so as to repeal or "modify, **except as applied to income**, those provisions of "the Constitution that require an apportionment ac- "cording to population for direct taxes upon prop- "erty, real and personal. **This limitation still has an ap- "propriate and important function, and is not to be over- "ridden by Congress or disregarded by the Courts.**" But, of course, it is imperative that the original provision, that thus still stands in full force and effect, **and the reasons for it**, be understood, if it is to be given its fully intended effect; and it is from the fact that, so far as the writer has discovered, this most vital viewpoint has nowhere, as yet, been even presented to the Courts, that this present Essay has been undertaken.

This is all the more surprising, if it be but remembered how constantly and repeatedly the Supreme Court has instructed us as to the proper and necessary method for the correct interpretation of the Constitution and its Amendments.

In the first place, the meaning of the Constitution **never varies.** It means today exactly what it meant on the day of its adoption. To hold otherwise would destroy the judicial character of the Supreme Court, and make the continuance of our "unalienable" rights completely uncertain. This has been forcibly stated in South Carolina vs. United States, 199 U. S., at 448: "The Constitution is a written instrument. **As such its "meaning does not alter.** That which it meant when "adopted it means now. * * * Those things which

"are within its grants of power, when made, are still "within them, **and those things not within remain still "excluded.** * * * Any other rule of construction, "**would abrogate the judicial character of this Court, and "make it the mere reflex of the popular opinion or passion "of the day.**"

The proper test is never merely to ask what we might guess the meaning **now**; but what was their meaning **then?** What the drafters of the Constitution would say of the interpretation asked? If the Court can say that the makers of the Constitution would not give the interpretation contended for, that, "they never would have approved of them," that: "The struggle against "arbitrary power, in which they had been engaged for "more than twenty years, would have been too deeply "engrafted on their memories to have allowed them to "approve of such insidious disguises of the old griev- "ances, which they had so deeply abhorred," the interpretation becomes impossible. Boyd vs. United States, 116 U. S., at page 630.

And "to determine the extent of the grant of "power **we must** * * * **place ourselves in the position of "the men who framed and adopted our Constitution, and "inquire what they must have understood to be the mean- "ing and the scope of those grants.**" South Carolina case, 199 U. S., at page 450.

"It must be interpreted in the light of the Com- "mon Law, **the principles and history of which were "familiarly known to the framers of the Constitution.**" Wong King case, 169 U. S., at page 654.

"The language of the Constitution, as has been "well said, **could not be understood without reference to "the Common Law.**" This principle is firmly established in the South Carolina case, 199 U. S. 450; the Minor

case, 21 Wall. 162; the Watson case, 114 U. S. 422, and in the Moore case, 91 U. S. 274, &c.

"The interpretation of the Constitution * * * "is necessarily influenced by the fact that its provisions "are framed in the language of the English Common "Law, **and are to be read in the light of its history.**" Smith vs. Alabama, 124 U. S. 478.

Why these unerring methods have not been heretofore fully applied is a strange enigma of this subject, especially as it is believed that they inevitably lead to correct solution of all the questions that have arisen or that may arise. It is passing strange that the meaning and genesis of the Sixteenth Amendment should have been sought, whilst those of the **two** provisions of the Constitution, in part amended by it have so far as ascertained, been no part of the inquiry.

But before making these essential inquiries, directed by the Supreme Court, a matter leading to much confusion of thought should first be disposed of. By some it has been earnestly contended that **all** amendments must be liberally interpreted. But it is believed, that there is no ground for such contention. Of course, on a very general principle, statutes are naturally to be construed if possible to be effective, not ineffective, and, therefore, where a power is constitutionally granted, the implied powers necessary to make the grant effective go with it. But that has nothing to do with the question as to what power has actually been granted. If a power be given to tax beans, that which is necessary to tax beans is certainly granted. No one denies that. But this does not, in the slightest degree, create a right to tax peas, though there be similarities, nor any implied powers necessary to do so. The rules of construction as to acts that, in effect, penalize or

burden citizens, as will be demonstrated, are of a directly opposite nature; and the fact that when a power is effectively given, it is to be so construed as to make it effective, has no bearing whatever on the primary question as to whether it exists at all.

The distinction is perfectly obvious, and has always been regarded by the Courts, as covering a vital part of our Liberty. Broom thus clearly states: "A "remedial statute, therefore, shall be liberally con- "strued so as to include cases which are within the "mischief which the statute was intended to remedy, "whilst, on the other hand, where the intention of the "Legislature is doubtful, the inclination of the Court **"will always be against that construction which imposes "a burden, tax or duty on the subject.** It has been desig- "nated **'a great rule'** in fiscal laws that they are not to "be extended by **any labored construction, but that you "must adhere to the strict rule of interpretation.**" The general rule is merely an application of the familiar maxim "*ut res magis valeat quam pereat*"; but to contend that because where the "*res*" is clearly declared, it is to avail, it follows that because it is to avail, there is conclusive proof that it has been created, merits no further refutation than a mere statement of the proposition itself. By such a method, any absurdity can be irrefutably demonstrated.

The main inquiry relating to the history, the Common Law, the economics and statemenship of the matter, may now be further followed.

All Americans will remember the conflict between Lord Mansfield and Lord Chatham upon this very question. Mansfield's argument, being supported by the King, and enforced against America, caused disruption of the British Empire, which would have been

prevented had the eloquent pleas and admonition of Lord Chatham been followed; and, later, this very policy of liberal treatment having been applied to Canada and Australia, taught the lesson of splendid sacrifices which will be made by freemen, treated as freemen ever should be. Who is not, even at this day, thrilled by Lord Chatham's inspiring language, that so entirely accords with the principles of Chief Justice White and Mr. Justice Holmes, already adverted to: "I come not "here armed at all points, with law cases and Acts of "Parliament, with the statute book doubled down in "dog's ears, **to defend the cause of Liberty**. But * * * "for the defense of **Liberty, upon a general principle, "upon a Constitutional principle, it is a ground on which I "stand firm—on which I dare meet any man.**"

To a man forgetting what the genesis of the Supreme Court was, what mighty purpose of its creation was, it might appear that Mansfield was right. But to one remembering that Liberty was protected by the Constitution of Great Britain; that we are living under the dispensation of the Common Law defended by Chatham, not the technical servitude of Mansfield; that by our Constitution the Supreme Court has a higher office than that of mere judicial action; that it is, in fact, made by the Constitution the **sworn and last defense of Freedom**, the real value of the thought of Mr. Justice Holmes, as expressed in the Northern Securities case, and amplified by the Chief Justice in the Standard Oil case, compels its due appreciation.

We are thus brought to the vital inquiry: What, then, is the "genesis" of the important clauses of Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4, of the Constitution? What was it that led the Founders **unanimously** to insist upon the adoption of these clauses as part of the Constitution?

No one will deny that the Founders' ideals of Liberty were clear and definite; that they were based upon upward of seven centuries of unvarying experience of themselves or their ancestors; nor the earnestness of their desire that the benefits of so many years of labor and sacrifice should surely accrue to the advantage of their and our posterity.

And, yet without the full inquiry imperatively demanded, questions are now being determined in relation to attempted modification of Constitutional safeguards, which the Fathers, out of their greater knowledge and unsurpassable judgment, felt absolutely necessary for the preservation of our freedom and happiness.

What was that Liberty that they were so striving to protect; the compelling reasons for the provisions actually adopted? How far, and if at all, can the Sixteenth Amendment be construed to depart from and nullify the underlying principles of the provisions which these patriotic masters of political science so carefully ordained? Can there be more important inquiry?

It were too long to recite Magna Charta, with its multiple provisions. The able summary of Henry Hallam succinctly serves the purpose. He says "It is "still the keystone of English liberty. All that has "since been obtained is little more than as confirmation "and commentary. * * * **The essential clauses of "Magna Charta are those which protect the personal liberty and property of all freemen, by giving security from "arbitrary imprisonment and arbitrary spoliation.**" And then, after quoting, he continues: "It is obvious that "these words, interpreted by any honest court of law, "convey an ample security for the two main rights of "civil society."

Magna Charta, after frequent confirmations, was questioned under the Tudors and Stuarts, but at last was definitely established by the "Petition of Rights" in 1628. This latter constitutional document, after quoting the fundamental Statute (of Edward I) de Tallagio, &c., "that no tallage or aid shall be laid or "levied by the King * * * **without the good will and "assent of * * * the freemen of the commonalty of this "realm,"** finally reasserts these fundamental rights.

In the Grand Remonstrance of 1641, we find additional protest against **"monopolies and other unlawful taxes."**

But Charles I died on the scaffold because he was unable to learn that there was one form of Liberty that the Anglo-Saxon peoples would never be deprived of, that is the right to be secure in their property, and free to grant or withhold their **consent** to being deprived of it.

There can be no greater justification of the care with which our forefathers fortified us against similar danger than the fact that Englishmen, having thus safeguarded their own freedom, having thus not merely fought for, but died for the principle involved, could, in less than a century, themselves attempt, by similar method, to destroy that of their fellow-subjects, living **at a distance**, in the Colonies, even though of identical blood and tradition; not, however, without vigorous protest from their own greatest men who really understood how important and of what Liberty consisted.

Lord Chatham immortalized himself by proclaiming to them in Parliament that they were dealing with "a subject of greater importance than ever engaged "the attention of this House, that subject only ex-"cepted, when, near a century ago, **it was a question of**

"whether you yourselves were to be bond or free." That "the Americans are the sons, not the bastards, of England." That "the taxes are a voluntary gift and grant. "* * * The Commons of America * * * have "ever been in the possession of this right, their Consti- "tutional right, of giving and granting their own money. "They would have been slaves if they had not enjoyed it."

But could there, now, be a greater absurdity than the contention that a Revolution, undertaken in support of this right, declared constitutional by Pitt, even before the adoption of our Constitution, had, in some mysterious way, been lost by their success in defending it?

That Pitt spoke correctly can be evidenced almost beyond limit. Thus Edmund Burke again told Parliament: "The people of the Colonies are descendants of "Englishmen. England, sir, is a nation which, still, I "hope, respects, and formerly adored her freedom. The "Colonists emigrated from you when this part of your "character was most prédominant. * * * They are, "therefore, not only devoted to Liberty, but to Liberty "according to English ideas * * *. It happened, as "you know, sir, that the greatest contests for freedom "in this country, were, from the earliest times, chiefly "upon the question of taxing * * *. They took infinite "pains to inculcate, as a fundamental principle, that * * * "the people must, in effect, themselves, mediately or imme- "diately, possess the power of granting their own money, "or no shadow of Liberty could subsist. The Colonists "drew from you, as with their life blood, these ideas "and principles. Their love of Liberty, as with you, "was fixed and attached on this specific point of taxing."

These fundamental rights having been always admitted by the best thought of England, it may be con-

sidered a work of supererogation to cite further authorities to prove how ardently Americans concurred. However, a few American instances may be briefly quoted, to show the complete parallel of thought between the greatest English lovers of Liberty and the whole body of American freemen.

The Stamp Act Congress of 1765 declared: "That "his Majesty's liege subjects in these Colonies are en- "titled to all the **inherent** rights and **liberties** of his "natural born subjects within the Kingdom of Great "Britain. This is **inseparably essential to the freedom of "a people, and the undoubted right of Englishmen**—that **"no taxes be imposed upon them, but with their own con- "sent.** * * * That all supplies to the Crown, **being "free gifts from the people**, it is unreasonable and incon- "sistent with principles and spirit of the British Con- "stitution for the people of Great Britain to grant to "his Majesty **the property of the Colonists.**"

Of course, as Lord Chatham so accurately pointed out: "The idea of virtual representation of America "in this House, **is the most contemptible idea that ever en- "tered into the head of man.** It does not deserve a seri- "ous refutation."

So that we have the constantly recurring thought that mediate assent through representation must not be so fanciful that it interferes with the **consent** being real.

The greatest thinker among those dealing with these great questions,—Benjamin Franklin,—put this most clearly, when summoned before the British Parliament to explain the Colonists' viewpoint: "**Their "money ought not to be given away, without consent, by "persons at a distance, unacquainted with their circum- "stances and abilities.**" And he pointed out that this

right of **consent** was esteemed by the Colonists "**of the "utmost value and importance, as it is security for all their "other rights.**"

Americans having fought for and won these rights, formed a government in the blaze of light afforded by their complete knowledge of them gained from their own immediate experience.

So deeply, so solemnly, were they impressed, that they felt it vital that it be known that these rights were not only "unalienable," but the direct gift from God. Jefferson splendidly said: "Can the liberties of a na- "tion be thought secure, when we have removed their "only firm basis—a conviction in the minds of men **that "these liberties are the gifts of God**; that they are **not to "be violated but with His wrath?**" And the Declaration, that made us a free nation, with unanimous approval of all taking part, asserted an identical principle. One of the grounds that justified the dissolving of our ties with the Mother Country was, of course, that she had been guilty of "**imposing taxes on us without our consent**," a violation of the rights by which we were endowed by our Creator, "unalienable Rights" of "Life, Liberty, and the pursuit of Happiness," for the security of which Governments are instituted among men, from whose **consent** such Governments **alone** derive their just powers.

In this all disclosing light we must certainly find true guidance as to the meaning and vital purposes of Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4, of the Constitution itself.

These provisions, indeed, stand on a parity with the provision assuring the independence of the Supreme Court (which also had been **unanimously** insisted upon), and have the peculiar distinction of having

been twice inserted into the Constitution—certainly a rare if not an unique thing; but a perfectly understandable thing to those who comprehend their true "genesis."

When one remembers what the Founders had just experienced, the liberality with which they granted consent to taxation is astounding. But there was one point where they would not yield,—where their actual experience had demonstrated the tyranny and oppression that was too sure to come, even where power of consent was held by their own kin and nationality, if those controlling such power were too distantly separated from them.

Blessed and happy, under the precautions the Fathers took to safeguard us, we have forgotten how they had suffered for want of such protection. We have lost both the learning and the knowledge which they had achieved through bitterest experiences. The Fathers, being great readers of Montesquieu, who, also, had pointed out the difficulty of a great Republic even continuing to exist at all, naturally feared what was the explanation proven by their own experience. Even Hamilton, though he felt a Republican Government was the only possibility, "expressed his despair of the practicability of establishing a Republican Government over so extensive a country as the United States."

But the solution found proved as simple as it was effective. Indirect taxation need not be feared, as had been proven by the failure of the British attempts, it being under the control of all citizens combining to abstain from the use of the taxed articles; but, which with a great and free people, would afford ample revenue not only to make the government rich, but dangerously rich, for enormous revenue is inevitably a temptation to

corruption, and dangerous and even despicable measures to obtain control of it. No free and great country had ever failed for want of revenue, though all are in danger from extravagance, waste and corruption.

But **direct taxation**, inflicted by men **too far distant** safely to be trusted with the vital power of **representative consent**, had long, not only been known, but proven to be a Republic's greatest danger. That the Constitution might be ordained, it was, therefore, imperative that this matter be completely safeguarded. The simplicity and effectiveness of the safeguarding provisions, in the Constitution, are most impressive. It was, therefore, ordained that, as there might possibly be emergencies requiring this power, that it should be granted, but only granted **conditionally**—(a practice, it will be remembered, that came into constant use under the reign of Henry III). That if the power were used, it could only be improperly used at the cost of penalizing every section **alike and equally**. And so our **internal** peace and happiness have continued. But have we not already new evidences, both in legislation and in the declarations of legislators, that like causes still have like effects, and that the apple of discord has once more been cast among us, though not yet bearing full effects because of the higher and paramount duty we all felt of submitting to anything necessary to preserve the freedom of the world through the recent crisis?

It cannot be doubted, therefore, that by following the suggestions of Mr. Justice Holmes in the Securities case, adopted, through Mr. Justice White, by the whole Court in the Standard Oil case, with the other guidance so clearly given by the Supreme Court, that we have reached the "**genesis**" of this matter that must profoundly affect the results which should finally be achieved?

No one has or will contend that the Supreme Court fell into error when it declared that: "Except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes" are not repealed or modified, as "**this "limitation has still an appropriate and important func-"tion, and is not to be overridden by Congress, or disre-"garded by the Courts.**" No one need doubt that this function was to prevent ultimate discord in our own country, that from the similar danger of **too distant power of consent**, had already rended in twain the British Empire.

We, thus, know the real "genesis" and high purpose, still subsisting, for which this provision was **twice** inserted in the Constitution; that it was to safeguard our Liberty against what all experience had demonstrated had always, theretofore, destroyed it; that is, the unlimited power of **consent** regarding direct taxation placed in the control of those **too distant** from us to insure fair and intelligent use.

And so the Sixteenth Amendment completely fails to establish the clarity of consent, necessary to let us continue freemen, except regarding but one phase of the matter, "**income**" alone. It not only does not grant but absolutely negatives any further power. We know how modern amendments to the Constitution have been made. We cannot possibly know how Congress and the Legislatures came to let down the bars in a matter that the Constitution still admittedly declares dangerous to American Liberty, as a general principle. The Amendment, or the discussion preceding it, gives us no clear light whatever upon the subject. Each of us may speculate upon that subject as he pleases. But we do know that the fundamental principle has only been

relaxed as to this single thing called "**Income.**" And thus we have a situation where, both positively and negatively, and from every point of view, whether we consider the subsisting principles of the Constitution or the Amendment itself, that can, alone, bring us to but a single result.

"Income" cannot by any possibility be stretched one iota beyond what "Income" has always clearly and generally been understood to be; if there be doubt, it must be construed in protection of the citizen; whilst, on the other hand, everything **directly** taxed must be strongly construed, to be within the protection of the principles originally introduced to protect our freedom, and as widely construed as is reasonably possible. Again, turning to the Common Law for our guidance in interpretation, we learn that it always **favors Liberty**. Even under the Tudors and Stuarts, it promulgated this fundamental and most important doctrine—"**In favour of Liberty.** * * * **Impius et crudelis** "**judicandus est, qui libertati non favet. Angliae jura in** "**omni casu libertati dant favorem.**" Coke on Littleton, 124 b. But the Constitution itself makes this doubly clear, fortifies it forever, goes even further, making it a chief purpose of that wonderful instrument—"We, "the people of the United States, **in order to** * * * "**secure the blessings of liberty to ourselves and our poster-**"**ity**, do ordain and establish this Constitution for the "United States of America." And every Judge of the United States, as well as of every separate State, "shall be bound by oath or affirmation to support this "Constitution." As Broom so well says: "If any doubt "arises from the terms employed by the Legislature, it "has always been held a safe means of collecting the "intention, the ground of making the statute, **and to**

"**have recourse to the preamble**, which, according to Chief "Justice Dyer, **is a key to open minds of the makers of** "**the Act**, and the mischiefs which they intended to "redress." The Preamble to the Constitution shows that the Fathers had in mind and intention the loss of the blessings of Liberty.

To those who love Liberty, can anything be finer? A splendid tribunal, without regard to the possible individual theories of those who may from time to time constitute it, nevertheless, as honorable men, bound to seek that interpretation of every word, every line, **that will safeguard our freedom**, and containing a clear definition of the most essential things for the preservation of our Liberty. With such guidance, where is the difficulty?

Although the matter may not have been so presented, the Supreme Court, by its own instinctive love of Liberty, certainly has guided us to safety.

In Gould vs. Gould, 245 U. S. 151, it has declared that: "In the interpretation of statutes levying taxes, "it is the established rule not to extend their provisions, "beyond the **clear** import of the language used, or **to** "**enlarge their operations** as to embrace matters not "specifically pointed out. **In case of doubt**, they are "construed most **strongly** against the government, and "in favor of the citizen." This certainly evidences clear comprehension of the principle involved, that as taxation without **consent** constitutes slavery, men are not to be guessed or "construed" into servitude, with the assent of that Court, which is, in fact, **the chief guardian of their Liberty**. And so, too, on like principle, the Common Law has **always** declared. It will be remembered it is our chief reliance on Constitutional inquiry.

Thus in the THORLEY CASE,[1] LORD LINDLEY says: "All "* * * taxing acts are to be read strictly; that is to "say, they are not to be extended so as to have the effect "of imposing on the subject a tax which Parliament "has not **clearly** made him pay. These principles are "perfectly familiar."

Again, Baron Pollock says in the CLIFFORD Case:[2] "It is stated in Maxwell on Statutes, 1st ed., page 259, "that 'Statutes which impose pecuniary burdens are "'subject to the rule of strict construction. It is a well-"'settled rule of law that all charges upon the subject "'must be imposed by **clear and unambiguous language**, "'**because in some degree they operate as penalties. The** "'**subject is not to be taxed unless the language by which** "'**the tax is imposed is perfectly clear and free from doubt.**' "For this proposition several decisions and dicta are "cited, and there is no doubt as to its being a correct "statement of the law. * * * If the statute is so indefi-"nite and uncertain that it can be treated in two ways, "and the true construction of it is open to two views, "the one more favorable to the Crown and the other to "the subject, then the latter construction should be "adopted."

Again, in the Beech Case,[3] Lord Justice SMITH, quoting from Lord Chancellor WENSLEYDALE, says: "It "is a well-established rule that the subject is not to be "taxed without clear words for that purpose. * * * "The Legislature by the circuitous route it has adopted "has obviously failed to carry out its object; but if this

[1] Thorley vs. Massam, L. R. 2 Ch. 613, at page 623 (1891).

[2] Clifford vs. Comm. of Inland Revenue, 2 Q. B. 187, at page 192 (1896).

[3] Attorney-General vs. Beech, 1898 A. C. 147, at page 150 (1898).

"be so, all I can say is, so much the worse for the Crown." Lord Justice CHITTY says:[4] "It is incumbent on the "Crown when claiming, the tax to make out affirma- "tively that the case falls within the statute. * * * "You must see that the tax is **expressly imposed**; the "subject is not to be taxed without **clear words**." And this judgment was affirmed by the House of Lords.[5]

And in the late EARL OF SELBOURNE Case,[6] it is pointed out that in taxation the Crown can never ask **"a benevolent intepretation"** for itself. See also the following cases in the House of Lords; Partington Case,[7] Cox vs. Rabit,[8] Pryce Case,[9] Oriental Bank Case.[10]

As the Government has been engaged in a continuing effort to impose taxes prohibited by the Constitution before the amendment, through what would simply be tax legislation by overruling both the judiciary and the Constitution, it may well be worth while to say a few words upon the essentially different principles and policies involved, and the radically different dangers and consequences that would arise from so amending the Constitution.

The Supreme Court of the United States has referred to the oft used comparison between a tree and its fruits, as an illustration of the difference between "Capital" and "Income." There is, therefore, propriety in adhering to it, and insisting upon the greatest clarity in maintaining this essential distinction.

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[4] *Id.*, at page 155.
[5] 1899 A. C. 56.
[6] 1902, I. K. B. 396.
[7] L. R. 4, H. of L., at page 22.
[8] 3 App. C. 478.
[9] 4 App. C. 203.
[10] 5 App. C. 856.

It is obvious that, prompted by patriotism, citizens might readily, and with due regard to their country's welfare yield, at the Legislature's discretion, a portion of the **income** or **fruits** annually accruing from their capital. But who can say, by mere surmise or guesswork, that they would think it either patriotic or for the welfare of their country that their orchards should be taken or destroyed in whole or in part by **consent** controlled by those **too far away**, particularly if they had grown more valuable through course of time, and were so yielding the larger and the more permanent fruits necessary for the continued supply and preservation of their country? Who is there that would not think that this was as unwise as the fathers thought it? A patriotic citizen, referring to a familiar fable, might well agree to share the golden eggs with his country,—nevertheless, he might not reach the supreme folly of, directly or indirectly, joining in an assassination of the goose that was laying them! And when he also knew that the values of everything had **in paper money** become dependent upon the mere will of far-distant communities that might not even know or care for his local situation or interests, would he not, even with but ordinary intelligence, be astounded by the proposition that these far-distant communities were to be given a power to insist upon that slaughter, however stupid?

Returning again to our illustration, let us give a distinguishing example of perfectly obvious results that must follow such folly.

As population increases and business succeeds, if the community is not to run into idleness and distress, **there must be a corresponding growth of capital to insure the necessary employment and industry to produce contentment and plenty.** It is, therefore, absolutely essential that

there should be an adequate increase of the amount and efficiency of the capital item requisite to additional employment and production. It is obvious that this may be increased from its own slow growth and accretion in the course of industry; and that for a higher degree of prosperity there must be even additional savings from available fruits or income. People have thus already learned how pernicious excess profit taxes are, and are unanimously seeking their abandonment. They have learned, through hard experience, that excess profits necessarily result from under-capitalization, in a given industry; and that they are not only God's cure, but the only available remedy, aided by economy and thrift, for the disease itself; that they are but another of the evils that have been imposed by accepting the absurd argument that **unwisdom** is ever "**necessary**." To tax excess profits is no wiser than it would be in a siege to draw troops for the reinforcement of a weak point, from still weaker points, or to stop circulation to the least nourished part of the body. But it is astounding, with all these conditions before our eyes, that even a far greater evil is actually being contended for; that the very life blood of the economic body of the community is to be sucked from it by a construction that will make capital, and its natural and slow variation through the years, subject to a still greater and more disastrous spoliation.

Again illustrating from what we actually see about us. Assuming that by Governmental edict, and the general forgetfulness that inflation always creates illusory estimates of value, it happens that a man having an orchard, or a farm, or mill, or invested capital of any kind, suddenly is led to believe that it has increased, through misleading inflation, perhaps, to three hundred

per cent. of the real value (which ultimately is sure to govern), and for any reason should desire or be forced to change his location or investment—an investment that he wishes to continue, not for enjoyment or taxes, but for the even more essential purpose of aiding that production essential to the very existence of the community. If the Government in such case could consider these gradual accretions **to be "Income"** and could tax them and the Capital on which they accrue under the pretense that they constituted "Income," must not an absolutely final exhaustion, not merely of the resources of the public, but of the Government itself, become inevitable? Taxation then might not merely be the power to destroy, **but be destruction itself**. Could anything be conceived of more completely illogical than such a governmental policy that must destroy that upon which the Government must live,—a very essential source of the income upon which it must exist.

A man has his orchard. Through long toilsome years it grows to the perfection of production; it has not only increased in real value, but this real value has apparently been multiplied by the unwise exercise of a governmental function of dishonestly depreciating the measure of value, not provided for in the Constitution. Compelled or wanting to change to another location or thing, what is asked but that, in doing so, he must sacrifice a part, the greater part, or perhaps the whole, of this effective capital to the Government, under a mere pretense that this essential requirement of all, in truth and fact, nothing but capital is but income; so that, on the reinvestment of what he has left, both he and the community discover that by legerdemain and a false use of words, not merely his **income**, but his

productive capital has been cut in half, or nearly destroyed. If that can be done, under the long established rule of judicial interpretation so far as taxing is concerned, and the specious arguments of "Necessity" are listened to, nothing further seems necessary so far as revenue is concerned; for, by mere interpretation, a single taxing act, to be subsequently construed by the rule that it is to be interpreted, not by what it **clearly** says, but by what the executive officers of the Government imagine they need, will fill all requirements—and Liberty end. Are Americans hereafter, instead of being ruled by the doctrines prevailing even in Great Britain, to face the fact that henceforth, where the Legislatures, with their full powers are not pleased to be explicit and clear, the rule is to be, not that vagueness is not to continue to be "**so much the worse for the Crown**," but so much the worse for the people and their constitutionally-protected freedom? Are we no longer to be taxed by the clear mandate of our proper representatives, but by a substitute of clearly distinguished and conflicting words, inserted by the executive branch of our Government? That must be impossible, if we are to remain free, and, as keeping us so is the great privilege of the Supreme Court we should have no further cause for anxiety concerning the destruction of constitutional guarantees through such abuses of the power of taxation.

There could be found no better illustration of the dangers and futility of the made or inferred argument of that "**creed of slaves-necessity**," than the very matter under discussion. The taxing power, disregarding the decisions of the Supreme Courts, not only of the United States, but of all the States, burdens the people by unwarranted taxes, on the theory that "**Income**," at

least, may be construed to be identical with the "**Capital**" from which it issues. If a false situation thus created can be used to change the fundamental meaning of the Constitution; if the Tax Collector can thus benefit by his own wrong, and place the unjust burdens of his errors upon the shoulders of people entitled to be free, there would seem to be little benefit in Constitutional protection at all. But that which it is now especially desired to make clear is the fallacy of such arguments, for nothing could be more preposterous than the pretense that a Government could, upon such an argument, be entitled to continue a practice that, if Liberty is to be preserved, and the Constitution protected, must be ended, and can be ended, at once, and without injury to any. For it must be borne in mind that the Government has the full Constitutional right to raise all its necessary revenue by the lawful exercise of the power of taxation. Not to return **to the same community** a sum taken unconstitutionally can in no sense be **a necessity**, when there continues the full power to take an equivalent amount justly and in accord with Constitutional right. And as we live under God's rule, it will always be found that these alleged "**necessities**" to do wrong are, as **John Milton** and **Lord Chatham** have pointed out in denouncing them, "**pleas of tyrants and creeds of slaves**" alone!

It is thus found that what we are dealing with is but an amendment **creating a power of further burdening an already heavily taxed people.** We have learned, however, from the Supreme Court how such statutes must be construed. And it has told us why. It cannot too often be said we were slaves, were a real **consent**, our real consent, not thus required. The vital thing is that we must not be enslaved by interpretation that admits

of doubt. The taxing power always has, if the people really approve, the full power of clear statement, and there is, therefore, no pretext for "paltering with us in a double sense" in so vital a matter. If the Government is not content plainly to ask specifically what **consent is desired**, that of iself is strongest reason to be on guard!

When we consider the matter from the viewpoint of the surviving Liberty that still abides with us in the unrepealed provisions of the original Constitution, the solution becomes overwhelmingly clear, for by History, Common Law and Constitution, they deeply involve our Liberty, and must be safeguarded against everything. We should thank our Creator that we have a Supreme Court that has never faltered in such cases.

As one may see by reading the decision in Towne vs. Eisner, 245 U. S. 418, the unanimous decision in Lynch vs. Turrish, 247 U. S. 221, and the very instructive discussion of the Justices in the Macomber case, which, though the point actually decided lies outside of the purpose of this work, the doctrines contended for in this Essay are, again, unanimously supported. The only real point actually involved, if the Macomber case be understood by the writer is whether or not the majority of the Court were right in considering, for example, that if a man had checked his hat and been given two checks for it, or had received duplicate bills of exchange for a single sum, or taken duplicate title deeds for his property, or been given, say, ten-twentieths, instead of five-twentieths of the same thing, he had really doubled it or not, for purposes of taxation. But there can be no question raised, since the unanimous decisions in the Gould, the Towne, and the Turrish cases. If they be but adhered to, and only considered so far as

the points actually **fully** discussed or decided therein (see as to possible dicta Cohens vs. Virginia, 6 Wheaton 399), they will afford proper solution in the fundamental principles really involved and fully considered.

For none can deny that before the "burdening" Amendment, free Americans possessed a **clear liberty** to use the results of their "pursuit of Happiness," at their free discretion, as "Capital" or "Income"; no one can deny that the slow accretions of Capital, as against equal possible wastage, could at their free discretion, and until they voluntarily severed it, still remain only Capital, and untaxable as such. Where, it may be asked, is our **clear consent**, that any taxing officer can destroy the **fundamental** liberty, by calling what the Supreme Court has maintained for half a century to be **Capital, and Capital only**;—what it never in all history has been, that is the entirely different thing called "**Income**"? Where, it is repeated, has our **consent** ever been granted, without which we would otherwise be reduced to servitude? Where is there the slightest evidence of assent to that? Is there the slightest doubt as to what the reply of the Fathers would be,—the real test?

The Supreme Court has more than once definitely ruled that the mere accretions to the Capital fund are but **increases of Capital, not Income at all** (Gray vs. Darlington, 15 Wall. 63; Lynch vs. Turrish, 247 U. S. 221, a very recent and unanimous decision; and see Towne vs. Eisner, 245 U. S. 418), the whole difficulty is described by Mr. Justice Holmes when, in his opinion in the Northern Securities case, 193 U. S., at page 403, he says: "Much trouble is made by substituting other "phrases **assumed to be equivalent, which then are rea-** "**soned from as if they were in the Act.**" And complete solution must result, if, in the present case, these words

having been already so completely defined, the Courts will, as Justice Holmes did but "**stick to the exact words used**," and not substitute for "Income," "Capital" or any part of that which has been repeatedly defined as "Capital" alone.

Therefore, to summarize: If the methods directed by the Supreme Court be followed, no one can deny that our Constitution provides for the safeguarding of our Liberty; that a condition of servitude is imposed on us, if the lawful results of our "pursuit of Happiness" could be taken from us withou full **consent really and freely given**; that so far as **direct** taxes are concerned, such **consent**, generally, not only cannot be given for the people of any single State, **by those distant**, unless apportioned as provided in the Constitution, but is absolutely denied, as a necessary protection of Liberty from what had already so destroyed it, as to require a fratricidal war to regain it; that this was the solemn conclusion of the greatest, most patriotic, body of statesmen ever assembled; that the general principle remains inviolate, though, for unknowable reason, power to subject us to this danger to our Liberty, is and has been granted but only in one respect, that is as to "**Income**," but, again, "**Income**" alone! That this provision is "burdening," not remedial—for he would have not only courage, but a grim sense of humor, who could contend, especially in these times, that further powers to burden the people, had for the first time become "remediable" legislation. That "**Income**" had not only never been defined as Capital or Capital accretions, in continued use as Capital, but by more than one decision, and during a period exceeding half a century, continuously and clearly declared by the Supreme Court, not to include either! And that the only reply

is that the taxing power, nevertheless, did not approve of the superiority of the Constitution; and its interpretation by the Supreme Court; so that the matter has really reduced itself to what and who is the controlling and final authority in matters relating to the very vitals of Liberty under the Constituion. It can safely be left there.

There has been but one instance in which the methods thus applied, have been departed from, but with such evil results, and results that would so enormously enhance the evils of a second departure, that a second chapter in relation to it may be of advantage.

CHAPTER II.

THE COST OF IGNORING THE METHODS OF CONSTITUTIONAL INTERPRETATION AS PRESCRIBED BY THE SUPREME COURT.

*"Constitutional provisions for the security of person "and property should be liberally construed. * * * "It is the duty of Courts to be watchful for the con- "stitutional rights of the citizen, and against any "stealthy encroachments thereon."*

—Monongahela Navigation Co. vs. United States, 148 U. S. 325.

Article I, Section 8, Clause 5 of the Constitution provides that Congress shall have power "**to coin money.**" Clause 6: "To provide for the punishment of counter- "feiting the securities and **coin** of the United States." It, therefore, expressly provides for the money that Congress is to have the power to make, as well the kind of money that Congress is to have the power of punishing the counterfeiting thereof. It does not leave this power open to implication. The power is definitely defined. The claim that the words "**and also issue paper money**" should be added, would seem to be disposed of by mere reference to the established maxim "**expressum facet cessare tacitum**"; for "if authority is given expressly, "though by affirmative words, upon a defined condi- "tion, the expression of that condition, excludes the "doing of the act authorized under other circumstances "than those defined, '**expressio unius est exclusio alteri- "us**'." Willes, J., North Stafford case, L. R. 3, Ex. 177.

But were there doubt, it was the duty of the Court, as already explained, to solve it, by inquiry as to the

history of the matter, and what must have been the meaning at the time of those who ordained the Constitution.

No one thoroughly searching this out could have been left with a possibility of doubt. If there was anything from which they had suffered, it was a paper currency, whose value had so depreciated that it had come to symbolize extreme and contemptible worthlessness! There was nothing that they thought more "iniquitous," more "ruinous," more "fraudulent," more "poisonous of the community," more "to establish iniquity by law." That they so regarded paper currency is beyond possible doubt.

It so happened that there existed in the smallest State of the Union, Rhode Island, a faction of anti-Federalists in favor of continuing the power of issuing paper money and passing Tender Acts. They not only seemed to have stood alone, but their answer was left to one of the greatest of the founders of our Government, a man that President Washington so approved that he subsequently made him the Chief Justice of the United States, with the consent and approval of the Senate. Oliver Ellsworth was not only a patriot, but a great lawyer, and no man can believe, who reads his splendid treatment of this subject, that the founders of our Government, by any possibility, could have dreamt that they were creating an implied power to do that which they believed was both dangerous and infamous. In his scathing address of March 17, 1788, "To the Rhode Island Friends of Paper Money, Tender Acts and Anti-Federalism," he says:[11] "The singular sys-

[11] "Federal Statesmen Series" (Albert Scott & Co., Chicago 1894), Vol. II, page 600.

"tem of policy adopted by your State, no longer excites "either the surprise or indignation of mankind. There "are certain extremes of iniquity, which are beheld "with patience, from a fixed conviction that the trans- "gressor is inveterate, and that his example from its "great injustice hath no longer a seducing influence. "* * * Experiments in public credit, though ruin- "ous to thousands, and a disregard to the promise of "government had been pardoned in the moment of ex- "treme necessity, and many honest men did not realize "that a repetition of them in an hour less critical would "shake the existence of society. Men full of evil and "desperate fortune were ready to propose every method "of public fraud that can be effected by a violation of "public faith and depreciating promises. This poison "of the community was their only preservation from "deferred poverty, and from prisons appointed to be the "reward for indolence and knavery. An easement of "the poor and necessitous was plead as a reason for "measures which have reduced them to more extreme "necessity. Most of the States * * * have made "their experiments in a false policy; but it was done "with a timorous mind, and seeing the evil they have "receded. A sense of subordination and moral right "was their check. Most of the people were convinced, "and but few remained who wished to establish iniquity "by law. To silence such opposition as might be made "to the new Constitution, it was fit that public injustice "should be exhibited in its greatest degree and most "extreme effects. For this end Heaven permitted your "apostacy from all the principles of good and just gov- "ernment. By your system we see unrighteousness in "the essence, in effects, and in its native miseries. The "rogues of every other State blush at the exhibition.

"* * * The very naming of your measures is a com-
"plete refutation of anti-Federalism, paper money and
"tender acts, for no man chooses such company in argu-
"ment. The distress to which many of your best citi-
"zens are reduced * * * of widows and orphans,
"demonstrates that unhappiness follows vice by the un-
"alterable laws of nature and society. * * * The
"whole Union has seen and fears, and while history
"gives true information, no other people will ever re-
"peat the studied process of fraud."

It was upon this argument that in the next year the Constitution was adopted, and this prediction held true through all the difficulties of our subsequent wars and throughout the following generations until the Supreme Court reversed itself in the later Legal Tender decisions, which were obtained in the manner familiar to all, opening forever a perfect Pandora's box of dangerous and unceasing evils to our country; and not the least of these, to the Supreme Court of the United States itself, the supreme and most important invention of the Constitution. For upon it must continuously fall the task of passing upon the unjust attempts of classes to impose unfair burdens.

However that may be, and however serious the burdens that ourselves and our posterity must ever struggle with, however the backs of toilers may stagger under them, the present interest is confined to the fact that we must hereafter consider further proposed encroachments upon the Constitution with the knowledge of the existing factor that it is, until the later Legal Tender decision may happily be departed from, still within established governmental power to play a game of battledoor and shuttlecock with the values of all commodities by legislation creating a depreciating cur-

rency; and, thus, try to realize the consequences of an added similar departure from the methods of interpretation so often designated by the Supreme Court.

The Supreme Court, of course, remained true to its principles. The real responsibility was on the legislative and executive branches of the Government, not on the Judiciary, for the overthrow of the first decision rendered in the legal tender cases. The method by which the later decision was secured is well known to all students of constitutional law and history.

For if ever a Pandora's box of evils was let loose upon the country, it was in this unhappy instance.

Forever now, political pressure will be brought upon the Congress, to advance prices by depreciating the currency; forever will conflict continue between those wanting indirect relief from debt, and those wanting honest payment; forever must the commercial interests of the nation be liable to be suddenly converted into the wildest gamble, with the certain results of either ruin, or disturbing charges of alleged "profiteering"; forever must our wars cost us at least double; forever must the Supreme Court be burdened with an irritating and dangerous conflict, dangerous to it and to all! A greater part of the present commercial distress is due to this evil, which the Founders strove so hard to guard us against.

The Supreme Court has well instructed us: That this question as well as all others "which run along "the line of the extent of the protection the individual "has under the Constitution against the demands of "the Government is of importance; for in any society "the fullness and sufficiency of the securities which sur-"round the individual in the use and enjoyment of his "property constitute one of the most certain tests of

"the character and value of the government." Monongahela case, 148 U. S., page 324. So that we are compelled to face the real danger confronting us, and ascertain whether we are to remain a free Republic or become a Bolshevist despotism? For, obviously, the real distinction between them lies in the fact that, in the first case what men properly gain from their unalienable pursuit of happiness **is theirs**. Whilst in the latter it is subject to the control of those who have not created it. That: "**Indeed, in a free government, all other "rights would become worthless, if the Government pos-"sessed an uncontrolled power over the private fortunes of "every citizen.**" Chicago, &c. case, 166 U. S. 235. That: "**Life, Liberty, and Property, and the equal protection of "the law**, grouped together in the Constitution, **are so re-"lated** that the depreciation of any one of these separate "and independent rights **may lessen or extinguish the "value of the other three.**" Loan Association Case, 20 Wall. 663; Smith ys. Texas, 233 U. S. 636. That: "You take my life when you do take the means whereby I live." Adams Case, 244 U. S. 593.

But such taking, by majority order, is the very heart of the Russian polity; the prohibition of it, that of Free America. So it follows that we now have the inevitable official report that Russia has become a veritable "vacuum of goods." The knowledge that by not enslaving men, we are still, after all our trials, the richest, best supplied nation the world has ever known, to which all other countries are looking for aid, through the kindly principles of freedom, the inevitable results of merely safeguarding men in their enjoyment of what their labors have produced, and consequently and fairly is their own. In other words, that enslaving men is always economic error. But—"By their fruits ye shall know them!"